

No. 17500 ✓

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOE DRAGICH and VAN CAMP SEA FOOD COMPANY, INC.,

Appellants,

vs.

NIKOLA STRIKA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of the Jurisdictional Facts.

Appellee adopts the Statement of Jurisdictional Facts set forth in Appellants' Opening Brief. (Appellants' Op. Br. pp. 1 and 2.)

Statement of the Case.

This being an appeal based on the sole ground that there was no evidence adduced at trial to support the findings of the trial judge, libelant-appellee feels compelled to set forth his own statement of the case, rather than adopt that of appellants, because appellants improperly omitted in their statement to set forth the evidence introduced at trial by libelant-appellee in support of his cause of action.

The pleadings (including the pre-trial conference order) may be summarized as follows:

Libelant-appellee is a fisherman, and prior to January 18, 1960, he was hired as a member of the crew of respondents' vessel, the "U. S. LIBERATOR" for the tuna fishing season ending on or about June 30, 1960, with wages in the form of a share of the catch. [Tr. 4.] While in the service of said vessel libelant became ill and as the result of said illness was forced to leave said vessel on or about January 18, 1960. [Tr. 5.] Libelant was thereafter found to be unfit for further sea duty, and in need of, and he did receive, medical care and cure up to the time of the filing of the libel. [Tr. 5.] Libelant sought maintenance at the rate of \$8.00 per day for each day of cure (not including days spent in the hospital), and a full share of the proceeds of the catch of said vessel for the balance of his employment tenure. [Tr. 5.]

Appellants admitted ownership of the vessel, but denied that libelant fell ill while in the service of the vessel. Appellants claimed that libelant was discharged for cause on January 18, 1960. It was stipulated that the contractual period of libelant's employment was for the 1960 tuna fishing season beginning on January 1, 1960 and ending on or about June 30, 1960. [Tr. 9.] It was further agreed that libelant was entitled to \$8.00 for each day of maintenance due him. [Tr. 9.]

At trial it was stipulated that if libelant was entitled to wages, the amount thus due him was \$3,831.78. [Tr. 66.]

All of libelant's allegations were found to be true by the trial court. It was found that libelant was entitled to 180 days of maintenance, or \$1,440.00, and \$3,831.78 as his share of the catch of said vessel, plus interest. The court also found that libelant was not discharged for cause by respondents.

At trial, libelant introduced evidence to the following effect:

Respondent Dragich called libelant one Sunday morning in September 1959, and asked libelant to join the crew of the "U. S. LIBERATOR", in response to which libelant quit his position as a member of crew of the "WESTERN STAR" and joined the crew of the "U. S. LIBERATOR". [Tr. 35, 103.] Libelant, having just completed almost two years of fishing aboard the "WESTERN STAR," entered the service of respondents' vessel thinking himself fit for duty. [Tr. 56.] Indeed, respondent Dragich also thought libelant fit for duty at that time. In fact, Mr. Dragich testified that he thought he hired an able-bodied, healthy seaman when he hired libelant, and he based his belief on what he knew about libelant in the past and what he had observed of him up to that time. [Tr. 105.] It is significant to note that Mr. Dragich knew libelant for about five years prior to hiring him. [Tr. 103.]

Libelant left the "WESTERN STAR" after almost two years [Tr. 34] of doing a crew member's work of all kinds aboard her. [Tr. 35-36.] During that time he never had to stop working while the other members of the crew worked. [Tr. 36.]

Libelant joined the crew of the "U. S. LIBERATOR" in September, 1959, and was rehired for the 1960 tuna fishing season ending on or about June 30, 1960. [Tr. 9.]

Libelant's first trip aboard the "U. S. LIBERATOR" lasted from September to October, 1959. [Tr. 37, 74-75.] On that first voyage libelant worked "piling cork" [Tr. 37, 72, 78, 115], ". . . which is one of the hardest sections of the net to work." [Tr. 28.] Libelant worked

on “the corks” throughout the first trip. [Tr. 72.] His work assignment was not changed during the first voyage. [Tr. 85.] At the end of the first trip libelant participated in the work of unloading the catch by working down in the hatches of the ship loading fish into buckets. He also carried buckets of fish. This was work that the entire crew participated in. [Tr. 38-39, 79-80.] At all times throughout the first trip libelant felt all right and did his work. [Tr. 38.] No one complained to libelant about his work during the first trip or during the unloading job at the end of the first trip. [Tr. 37, 39.]

Libelant remained a member of the crew of the “U. S. LIBERATOR” and sailed aboard her again (second voyage) in October, 1959. [Tr. 39, 80.] As the second trip began libelant continued doing the same work he had done on the first trip *i.e.*, “working the corks.” [Tr. 80.] Approximately one-third of the way through the second trip, when the “U. S. LIBERATOR” was fishing in 100° heat somewhere off the shore of Acapulco, Mexico, libelant was overcome with what a member of the crew called “heat prostration” [Tr. 81] and he fainted two or three times on successive days. [Tr. 40, 42, 44, 81.] He lost his color [Tr. 81-82] and “was just glassy.” [Tr. 81-82.] His physical movements slowed down considerably. [Tr. 82.] He had trouble getting around to such a degree that it was very noticeable. [Tr. 83.] That marked change and slowdown took place after libelant suffered the aforementioned period of “heat prostration.” [Tr. 83.] Members of the crew complained that “this heat was too much for him, that he was too ill.” [Tr. 86.] Libelant then heard murmuring and complaining that he was unable to do his work. [Tr. 52.]

At that time libelant was removed from “the corks” and was placed on the lead line “. . . which was an easier job than the corks. He could not even handle the lead line, and was put on the hook, which was the simplest job on the boat, and this was even an effort for him.” [Tr. 87.] Libelant felt weak and dizzy subsequent to his fainting spells. [Tr. 50.]

When the “U. S. LIBERATOR” returned to San Pedro and unloaded at the end of the second trip, the skipper of the “U. S. LIBERATOR” told libelant, on January 18, 1960, “I can not have you on the boat because you are sick. You better go see a doctor.” [Tr. 51, 55.]

When respondent Dragich told libelant that “You are sick, you can’t be on the boat, you go see a doctor” [Tr. 55], libelant went to see a marine doctor at the United States Public Health Service, at San Pedro, California (hereinafter referred to as “U.S.P.H.S.”), on January 18, 1960 [Tr. 60] with the hope of obtaining a fit for duty slip, because he still wanted to go fishing and hoped to convince respondent Joe Dragich that he was healthy enough to continue as a member of the “U. S. LIBERATOR”’s crew. [Tr. 62.] When libelant saw the marine doctor he asked for a general examination without stating his reason. [Tr. 61; Libelant’s Ex. 1, entry dated 1-18-60.] Libelant did not tell the doctor about the events of the second trip set forth above [See Libelant’s Ex. 1, indicating that U.S.P.H.S. first learned of libelant’s fainting episodes from respondents, and only *after* libelant was examined and given a fit for duty slip on January 18, 1960.] When libelant was examined at U.S.P.H.S. on January 18, 1960, he “told them nothing.” [Tr. 53, 57.] Upon receiving his fit for duty card, libelant went to respondent Dragich and

showed it to him, saying that "I am okay, I want to go fishing." [Tr. 57.] Respondent Dragich replied, "Nikola, you are a sick man, you better go see doctor. You cannot fish, you are a sick man." [Tr. 58.]

Four days later, libelant returned to U.S.P.H.S. in San Pedro for re-examination, this time with the history of his fainting and slowdown on the second trip revealed to the U.S.P.H.S. [Tr. 58; Libelant's Ex. 1, entries on January 22, 1960.]

As early as February 27, 1958, in the course of a general physical check-up of libelant by a marine doctor at U.S.P.H.S., libelant was noted (unknown to him [Tr. 56]) to have a peculiar stare, stolid expressionless face with mouth open, and speech a little thick. [Libelant's Ex. 1, entry dated 2-27-58.] A similar notation (again unknown to libelant [Tr. 56-57]) was made at that facility on November 24, 1958 and again on January 22, 1960, at which time libelant was declared unfit for duty. [Libelant's Ex. 1, entry dated Feb. 22, 1960.] Libelant's unfit for duty status was extended on February 11, 1960, and he was declared permanently unfit for duty on April 28, 1960. [Libelant's Ex. 1, entries dated Feb. 11, 1960 and April 28, 1960.] As a result of the examinations of libelant at U.S.P.H.S. commencing on January 22, 1960, he was found to have been (unknown to him [Tr. 56-57]) suffering from generalized arteriosclerosis with Parkinsonism secondary thereto, with diastasis, and libelant was hospitalized from February 29, 1960, through April 2, 1960. He was treated as an outpatient from January 22, 1960 through February 28, 1960, and from April 3, 1960, through September 30, 1960. On September 30, 1960, libelant was declared by U.S.P.H.S. to have

reached his maximum possible cure. The total number of said outpatient days was 180.

Fishermen, like the libelant here, are employed upon the basis of a share of the catch. [Tr. 8-9.] It was stipulated by both libelant-appellee and appellants that the amount of net earnings which libelant would have received as his share of the catch had he continued to fish aboard the "U. S. LIBERATOR" from January 18, 1960 through June 30, 1960, was \$3,831.78. [Tr. 66.]

Notwithstanding the evidence set forth above, appellants contend that there was no evidence introduced at trial to support the district court's finding that libelant fell ill while in the service of the vessel and left the vessel on account thereof. (Appellant's Op. Br. pp. 10, 12.) The trial court's rulings to the contrary and appellants' contention that the trial court was incorrect in so ruling pose the issue to be determined on their appeal.

Summary of Argument.

I. There was substantial evidence adduced at trial to support the trial court's findings that libelant became ill while in the service of respondents' vessel "U. S. LIBERATOR" and left the vessel on account of said illness.

II. The court of appeals should not consider the oral comments of the trial judge made at the conclusion of the trial in open court before the written findings of fact and conclusions of law and judgment were approved and filed.

ARGUMENT.

I.

The Trial Court Correctly Ruled That Libelant Fell Ill While in the Service of the Respondents' Vessel and Left Said Vessel on Account of Said Illness.

A fisherman who falls ill while in the service of his employer-shipowner's vessel is entitled to maintenance and cure as well as wages. Those entitlements are rooted in maritime law and are incidents of the fisherman's right of employment. *Vitco v. Joncich*, 130 Fed. Supp. 945 (1955), affirmed 234 F. 2d 161 (C. A. 9th 1956).

Libelant fell ill "while in the service of the vessel," as the authorities which define "in the service of the vessel" clearly establish. A fisherman falls ill "while in the service of the vessel" if he falls ill while generally answerable to the call of duty. *Aguilar v. Standard Oil Co.*, 318 U. S. 724, 87 L. Ed. 1107 (1943); *Danstrup v. The R. P. Hobson*, 118 Fed. Supp. 453 (1954). His illness need not have originated *during* the voyage. *The Betsy Ross*, 145 F. 2d 688 (C. A. 9th, 1944); *The Bouker No. 2*, 241 Fed. 831 (1917); *The Laura*, Fed. Case No. 10092 (1872). So liberally have the courts construed the proposition that the illness need not have originated during the voyage that maintenance and cure has been ordered in cases involving incurable ailments which are discovered after the commencement of the seaman's employ. *Calmar Steamship Corp. v. Taylor*, 303 U. S. 525, 82 L. Ed. 993 (1938); *Aguilar v. Standard Oil Co.*, *supra*; *Cordes v. Weyerhaeuser Steamship Co.*, 75 Fed. Supp. 537 (1946). In *Calmar*, *supra*, libelant stubbed his toe while aboard the vessel and

Buerger's Disease was discovered to exist upon his being examined *at the U.S.P.H.S. on shore, over one month later.* (See *Calmar Steamship Corp. v. Taylor*, 92 F. 2d 84, 85-86 (1937).) Libelant was awarded maintenance and cure as a result of that discovery. In *Cordes, supra*, libelant was found to have a tubercular condition which existed prior to his shipping out and was manifest while he was in the service of respondents' vessel. He was awarded maintenance and cure as a result thereof.

This rule has been applied even in cases in which a seaman believed that he had recovered from a prior condition but actually had not. *Fuentes v. Panama Canal Co.*, 146 Fed. Supp. 303 (1956). Accord: *Lindquist v. Dilkes*, 127 F. 2d 21 (1942); *Weiss v. Central R.R.*, 235 F. 2d 309 (1956).

In the case at bar, evidence was adduced at trial that libelant entered the service of respondents' vessel with an undiscovered history of what later was revealed by the U.S.P.H.S. to be Parkinson's Disease. Yet both libelant and respondent Joe Dragich, who hired him, thought that he was an able-bodied seaman.

Evidence was adduced at trial that during the tenure of libelant's first trip aboard the "U. S. LIBERATOR" he uninterruptedly performed heavy duty, and at the end of that first trip he participated in the unloading of the ship's catch. Libelant's evidence further showed that libelant began his second trip aboard respondents' vessel with the same job assignment, and without anyone complaining to him or speaking to him about his work or his physical condition. Finally, evidence was received that libelant experienced a physical change after suffering a series of fainting spells about

one-third of the way through the second trip. As a result, he felt weaker and slower. Libelant had to be, and was, switched from heavy to extremely light duty for the balance of the trip. At the end of the second trip libelant was told that he was sick by respondent Dragich and he visited the U.S.P.H.S., which resulted in his being declared permanently unfit for duty as a sufferer of Parkinson's Disease.

The above evidence was accepted by the trial court as credible and convincing. That evidence clearly supports and justifies the trial court's findings that libelant took ill "while in the service of the vessel," as that concept of "illness in the service" has been interpreted by the courts, and that libelant left the vessel on account of that illness.

An appellate tribunal does not sit as a jury to determine issues of fact, credibility of witnesses, or weight to be attached to testimony. *Balasco v. Chick*, 84 Cal. App. 2d 802 (1948); *Moran v. Bromley*, 112 Cal. App. 2d 520 (1952); *Cal. Code Civ. Proc.*, §1847. Likewise, where an action is tried by court without jury, findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. *United States v. Oregon State Medical Soc.*, 343 U. S. 326, 96 L. Ed. 978 (1952); *Fed. Rules Civil Proc.*, Rule 52(a), 28 U. S. C. A.

The trial court having accepted as credible and true libelant's evidence that he took ill during the course of his service aboard respondents' vessel, and that the same caused his departure from that vessel, this appellate body cannot and should not disturb those findings.

II.

The Oral Comments of the Trial Judge Made at the Conclusion of the Trial Should Not Be Considered on Appeal.

It is well established that once findings are made, they supersede a previous opinion rendered by the trial court. *Titus v. The Santorini*, 258 F. 2d 352, 354-355 (C. A. 9th, 1958). In *Titus*, the trial court filed a written opinion. Thereafter that court approved and had filed findings of fact which on appeal were claimed to be inconsistent with the opinion. The court held that the function of the findings was to supersede the opinion, “. . . thenceforward the opinion having no more standing than random observations made by a trial judge in the course of a trial.” Oral statements made by the trial judge at the close of a trial can have no effect on the findings of fact which were signed and filed. *Wilcox v. Sway*, 69 Cal. App. 2d 560, 565 (1945); *Dell v. Hjorth*, 51 Cal. App. 2d 576, 579 (1942); *Fisk v. Casey*, 119 Cal. 643, 645 (1898); *Phillips v. Hooper*, 43 Cal. App. 2d 467, 470 (1941). It is settled that inconsistencies between antecedent expressions of the trial judge and the findings of fact cannot be considered by an appellate court. *Lord v. Katz*, 54 Cal. App. 2d 363, 367 (1942).

Conclusion.

Without attempting in any way to deal with or distinguish the evidence produced by libelant at trial, respondents ask for a reversal. They cite no authority and offer no reason in support of any position they

take. The record before this court does not suggest in any way that the trial court abused its authority in making its written findings. Accordingly the decision of the court below should be affirmed in its entirety.

Respectfully submitted,

MARGOLIS & McTERNAN,

By DAVID B. FINKEL,

Proctors for Appellee.

APPENDIX.

Table of Exhibits.

<u>LIBELANT'S EXHIBITS</u>	<u>Transcript of Record Page</u>		
	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
Exhibit No. I			
U. S. Public Health Medical Records From 1/19/60 Hence	64	64	64
Exhibit No. I—			
U. S. Public Health Medical Records Prior to 1/19/60	66	66	66
<u>RESPONDENT'S EXHIBIT</u>	<u>Transcript of Record Page</u>		
	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
Exhibit A—			
Document signed by Crewmembers Requesting Libelant Be Relieved	93	92	92

